Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**No. 78-883**

NEWMAN SIGNS, INC.,
a North Dakota corporation,
*Appellant/ Petitioner,*

v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner, and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
*Appellees/ Respondents.*

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

## MOTION TO DISMISS OR AFFIRM

Albert A. Wolf
Special Assistant Attorney General
For the State of North Dakota
WHEELER, WOLF, WEFALD & PETERSON, P.C.
220 North Fourth Street
P.O. Box 773
Bismarck, North Dakota 58501
*Attorney for Appellees/Respondents*

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IN THE

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NEWMAN SIGNS, INC.,
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v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner, and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
*Appellees/ Respondents.*

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

## MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of North Dakota on the ground that the questions on which the decision of the cause depends have been decided by the Supreme Court of the State of North Dakota in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

# I.

## THE STATE INVOLVED AND THE NATURE OF THE CASE

### A. THE STATUTE

This appeal raises the question of validity of certain provisions of the North Dakota "Highway Beautification Act" (acts of the legislature of North Dakota, 1967, Chapter 24-17, NDCC, as amended, 1969, 1975, 1977), hereafter referred to as the "Act".

This statute provides that no outdoor advertising signs shall be erected or maintained within 660 feet from the nearest edge of the right-of-way and visible from the main traveled way of any highway which is a part of the State Highway System in the state except signs advertising the sale of the property upon which they are located, signs advertising services or activities on the premises upon which the sign is located, or signs which are located in zoned or unzoned commercial or industrial areas. The 1975 and 1977 amendments extended the prohibition beyond the 660 feet if erected with the purpose of their message being read from such main traveled way except signs advertising the sale or lease of the property upon which they are located and signs advertising activities conducted on the premises. The statute further provides that any signs which violate the provisions of the chapter shall be declared illegal by the Commissioner and upon thirty (30) days' notice to the owner thereof shall be deemed abandoned and removable from the premises by the Highway Commissioner.



### B. THE PROCEEDINGS BELOW

After January, 1972, when the Highway Commissioner executed an agreement with the Federal Highway Administrator as provided under the terms of Title 23, United States Code, §131, the Federal Highway Beautification Act of 1965, federal participation funds were made available for the removal of signs where just compensation was required to be made under the terms of the statute. The removal program was then commenced and notice was served upon the appellant for removal of certain signs which had been erected or expanded since the effective date of the Act as provided in the Act. Appellant commenced two actions against the Highway Commissioner to restrain such removal without compensation and the Highway Commissioner commenced an action to have certain classification of signs declared illegal and subject to removal without compensation, which actions were consolidated for trial. The trial court entered its judgment upholding the validity of the North Dakota Highway Beautification Act, but finding that its effective date was January 19, 1972, rather than January 1, 1968 as provided in the Act. The North Dakota Supreme Court entered its decision upholding the validity of the North Dakota statute and finding its effective date to be January 1, 1968 as provided in the statute.

# II.

## ARGUMENT

The case presents no substantial federal question.

(a) *Appellant contends that the statute violates First*

*Amendment Freedom of Speech rights.* The appellant relies primarily on the case of *Landmark Communications, Inc. v. Virginia,* ___ U.S. ___, 56 L.Ed.2d 1, 98 S.Ct. 59, in support of its freedom of speech argument. The *Landmark* case arose from an attempt by the State of Virginia to protect the good reputation of its judges and courts by punishing or repressing freedom of speech. The court held that although the government may punish the theft of privileged documents or deny access to such information, it cannot punish the publication once the information falls into the hands of the press who are non-participants in the proceedings which provide the information. In stating its opinion in the *Landmark* case, this court reiterated its previously established rules that First Amendment protection primarily extends to a free discussion of governmental affairs and the performance of public officials including judges. To have allowed Virginia to suppress the public discussion described in the *Landmark* case would have truly violated the First Amendment guarantees of freedom of speech. The decision, however, is not applicable to this case where the North Dakota statute merely controls the locations at which commercial expressions may be carried rather than controlling or suppressing the content of the message contained therein. The Supreme Court of North Dakota in the decision in question emphasized the important distinction between regulations aimed at message content on the one hand and time, place and manner of restrictions on the other, and found that the North Dakota Highway Beautification Act "does not purport to regulate speech on the basis of its content or completely prevent the dissemination of the same



information by alternative means. Rather, the statute merely provides restrictions on the place and manner of erection of the outdoor advertising signs."

The appellant cites the case of *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976). This case recognizes the distinction made by the North Dakota Supreme Court finding that to constitute a legitimate time, place, or manner of restriction, the regulation must satisfy three criteria:

(1) The restriction on speech must be justified without reference to the content of the regulated speech;

(2) The restriction must serve a significant governmental interest; and

(3) In so doing, the restriction must leave open ample alternative channels for communication of the information. In *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), cited by appellant, this court went to great lengths to demonstrate that the statute involved in that case prohibited signs containing a particular content, that is, the "for sale" signs located on front lawns. The court recognizes that although the proscription applies only to one mode of communication, it does not transform into a time, place, or manner case.

In order to clearly distinguish the citations referred to by appellant, one must distinguish, as the courts have generally done, between the statutes or regulations involving a content control on the one hand or a time, place, and manner restriction on the other. The Maine Federal District Court clearly applied the distinction in the case of *John Donnelly & Sons, et al v. Mallar,* 453 F. Supp. 1272 (D.C. Maine 1978), in

evaluating the Maine Travelers Information Service Act, an act substantially the same as the North Dakota Highway Beautification Act. In citing *Elrod v. Burns,* 427 U.S. 347 (1976) and *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600, (1975), the appellant has clearly demonstrated that it relies upon the "content" message restrictions authorities rather than the "time, place, and manner restrictions" authorities. *Elrod v. Burns,* supra, involved a dismissal of a municipal employee on the basis of political affiliation while *Bigelow v. Virginia,* supra, struck down a prohibition advertising abortion, clearly a content restriction. In addition to *John Donnelly & Sons v. Mallar,* supra, other courts have upheld the First Amendment constitutionality of billboard regulations as a valid time, place and manner restriction. *Markham Advertising Company v. State,* 439 P.2d 248 (Wash. 1968) app. dismissed, 393 U.S. 316; *John Donnelly & Sons v. Outdoor Advertising Board, et al,* 339 NE 2d 709 (Mass. 1975), *Ghaster Properties, Inc. v. Preston,* 200 NE 2d 328 (Ohio 1964).

The appellant has cited the case of *In re Primus,* 56 L.Ed. 2d 417 (1978) and *Ohralik v. Ohio State Bar Association,* 56 L.Ed. 2d 444, both cases having to do with state regulations of solicitation by members of the legal profession. This court distinguishes between legitimate truthful advertising for routine legal services and in-person solicitation of clients at hospitals and accident scenes. The exacting distinctions established by these two cases are important in determining the proper limitations on First Amendment rights of freedom of speech. The court also drew the distinctions between commercial and political speech, suggesting that the court has afforded commercial speech a limited



measure of protection commensurate with its subordinate position in the scale of First Amendment values while allowing modes of regulation that might be impermissible in the realm of non-commercial expression. The Arizona court in *Planned Parenthood Committee v. Maricopa County,* 375 P.2d 719 (1962) summarized at page 727 the various kinds of regulations that are generally accepted by the courts:

> "The limited area of speech activity, advertising, which is here regulated, is one which is subject to regulation in many contexts by both state and federal governments. The manner in which many commodities are advertised is closely supervised by the Federal Trade Commission. Advertisements for the sale of securities are highly regulated. The advertising of goods at less than cost is prohibited in some jurisdictions. . . ."

This court in *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) approved the prohibition of the use of sound trucks on the same grounds as other courts have validated billboard advertising statutes against First Amendment challenges. This court in *Packer Corporation v. Utah,* 285, U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932), recognized the intrusive nature of billboards, streetcar signs and placards which are constantly before the eyes of the observers on the streets to be seen without the exercise of choice or volition on their part, while other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. This line of thinking was also relied upon in *General Outdoor Advertising v. Department of Public Works,* 298 Massachusetts 149, 193 NE 799 (1935) and in *Markham Adv. Co. v. State,* supra.

The North Dakota Supreme Court in this decision

recognized, as have other states, that the Beautification Act addressed itself to a legitimate public purpose. The preamble to the Act explains the purpose of the enactment as follows:

> "Declaring public policy with regard to the regulation of outdoor advertising and the restoration, preservation and enhancement of scenic beauty;"

The declaration of policy as contained in Section 24-17-1, NDCC:

> ". . . in the public interest reasonably to regulate advertising devices along the highways hereinafter specified while, at the same time recognizing that both the convenience of travel and the interests of the economy as a whole require reasonable freedom to advertise. . . ."

Section 24-17-09, NDCC, prescribes the duties of the Highway Corridor Board established by the Act:

> "1. For the purpose of promoting the public health, safety, welfare, convenience, enjoyment and recreational value of the public highways, to protect the public investment in the state highway system and to preserve the natural beauty of lands bordering on the state highway system, . . ."

Because of its intrusive quality and its commercial nature, regulation of billboard advertising is entitled to a lesser degree of constitutional scrutiny as long as it meets the "time, place, and manner restriction" on free speech. There is no indication in the North Dakota Highway Beautification Act that any particular content of the messages are regulated by the Act. The placement restrictions of the Act, however, serve well defined governmental and public interests as enunciated by the statute itself. This court in *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) gives the basis for evaluating regulations within the concept of public welfare:



> "The concept of the public welfare is broad and inclusive . . . the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

The North Dakota decision also recognizes safety as a purpose of the Act and expresses agreement with the statement of the New York Appellate Court in *Whitmier & Ferris Company v. State,* 230 NE 2d 904 (1967), which recognized that legislatures could determine that the safety of the travelling public is endangered by the distraction of the attention of drivers of automobiles viewing advertising signs and can properly exercise the police power to control the location of those signs.

The North Dakota Highway Beautification Act is a reasonable "time, place and manner restriction" upon commercial advertising and does not deprive the appellant of any First Amendment freedom of speech rights. The test is indeed "reasonableness" of the control as weighed against the public benefits derived therefrom. *Markham Advertising Company v. State,* supra, suggested that there is no blanket requirement that the legislature must subordinate all other legitimate public interest to the protection of free speech, nor should the enforcement of the freedom of speech be in disregard of the rights of others as stated in *Kovacs v. Cooper,* supra.

(b) *Appellant contends that there is a deprivation of*

*due process arising out of a lack of notice and hearing provisions of the Act.* Section 24-17-11, NDCC, provides for the Commissioner to give thirty (30) days' notice to the owner of the sign, to remove the same if it is a prohibited sign or to cause it to conform to regulations if it is an unauthorized sign. Section 24-17-15, NDCC, sets forth the procedure to be followed by a person aggrieved by a decision that a sign is illegal giving a right to appeal pursuant to Section 28-32, NDCC. The 30-day notice allows a sign owner to request a hearing to appeal the decision, or seek injunctive relief as the appellant did in this case, all before the appellant's signs are removed by the Commissioner. Certainly this procedure meets the constitutional requirement of procedural due process. It was the North Dakota legislature that determined that certain signs would be illegal and subject to removal. The challenge to the constitutionality of the Act itself or the administrative decisions of the Highway Corridor Board or the Highway Commission would have been more properly brought shortly after the enactment. This issue will be discussed later.

Appellant's position on this point suggests that the Commissioner was required to hold a hearing and allow the sign owner to challenge the constitutionality of the Act or the wisdom of the legislation, before the removal of each sign. It was the legislature that deemed the removal of certain signs necessary in the State of North Dakota, and the appellant and other sign owners had their opportunity to be heard before the legislative body. The statute gave a 30-day notice to the sign owners to give opportunity to make known any circumstances or variances which would make the Act inapplicable to any particular sign. The appellant was



effectively protected by that procedure and effectively prevented the removal of signs by seeking judicial review during the 30-day notice period.

Appellant cites the case of *Memphis Light, Gas and Water Division v. Craft,* 56 L.Ed. 2d 30 (1978) in support of the notice requirement to fulfill the due process requirements. The case involved a municipal utility terminating customer service at will. The utility, a monopoly, was held by the court to have a right to terminate customer service only for cause. Apparently, the utility had no provision for notice of intention to terminate customer service comparable to the 30-day notice required by the North Dakota Highway Beautification Act before removal of signs. In *Mathews v. Eldridge,* 424 U.S. 319 (1976), cited by appellant, this court held that there was no deprivation of procedural due process where no evidentiary hearing was required prior to the termination of social security disability payments. In citing the case of *Morrisey v. Crewer,* 408 U.S. 471 (1972), the court in the *Mathews* case restated that "due process is flexible and calls for such procedural protections as a particular situation demands." The court goes on to suggest that resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.

(c) *Appellant contends that the Act deprives him of due process and equal protection in that it discriminates against certain outdoor advertising signs and denies appellant the right to do business.* Appellant cites the case of *Nectow v. City of Cambridge,* 277 U.S. 183 73 L.Ed. 184, in support of the contention that there has been a deprivation of the right to carry on an

occupation. In this case, the court found that the municipal zoning would not promote the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected, and therefore provided no basis to the city for denying the landowner a permit to erect certain buildings.

As part of the argument of discrimination against a class of signs as being prohibited by the equal protection clause of the Fourteenth Amendment, the appellant cites the case of *Dandridge v. Williams,* 397 U.S. 471 (1970) reh. den. 398 U.S. 914 where a three-judge 471 (1970) reh. den. 398 U.S. 914 where a three-Judge District Court panel held a Maryland regulation was violative of the equal protection clause. The court found "overreaching" because the regulation results in some disparity in grants of welfare payments to the larger families. The case came to this court after the regulation had been declared in violation of the constitution. The appellant cited *In re Griffiths,* 413 U.S. 717 (1973) where this court struck down the State Bar Association prohibition against admission of alien lawyers to the Connecticut Bar. The court held that when the state adopts a suspect classification, it bears a heavy burden of justifying the classification by showing that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary to the accomplishment of its purpose for the safeguarding of its interest. The court found, of course, that the state has other means of supervising the conduct of alien legal practitioners which would not necessitate the total elimination of such persons from the practice of law within the state. The North Dakota statute adopted a reasonable criteria for limitation of signs as distinguished from the



"alien lawyer" prohibition in Connecticut.

Appellant relies on *Grayned v. City of Rockford,* 408 U.S. 104 (1972) wherein this court struck down an ordinance controlling certain types of picketing. The court easily found the equal protection clause violated in that the city attempted to control certain types of picketing while allowing other types of picketing based on the message conveyed by the expressive conduct of such picketing, thereby determining disorderly conduct by the subject matter of the position conveyed by the picketers. Not only did the court find the lack of equal protection in this case, but also a violation of freedom of expression as the ordinance was based on the content.

The North Dakota statute in question does not attempt to control the "content" of the billboards as previously discussed, the statute is not repugnant to the federal constitution. Although it may affect various types of signs carrying all conceivable kinds of messages, it does not prohibit such signs based on the message contained therein, but rather on the location of the sign in respect to the traveling public, and with reference to the various communities of the state located along the highway system. Allowing certain on-premises signs, directional signs, and signs located in areas which are in the proximity of byways near the cities of the state, constitutes a reasonable distinction from signs that might otherwise be located away from the business or activities it advertises and that would be distracting from the otherwise unencumbered countryside and scenic view of the traveling public.

The exercise of police powers is the most important of governmental powers, as it affects the very existence of government as well as the security of the social order,

the life and health of the citizen, the enjoyment of private and social life and the beneficial use of property. 16 AmJur 2d Constitutional Law, §263, p. 517, 518. In *State v. Dolan,* 92 P. 995, the court properly defined police power as ". . . that power in government which restrains individuals from transgressing the rights of others, and restrains them in their conduct so far as is necessary to protect the rights of all." The distinction between exercise of police powers and the exercise of eminent domain often provides some further definition of police powers. Under police powers, many restrictions may be imposed without compensation being given, whereas under the power of eminent domain compensation is required. This distinction lies partly in the fact that in eminent domain, property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may, and often does, take property in the constitutional sense so that it must be paid for, this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value. Private property is taken by eminent domain for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public purpose, but to conserve the safety, morals, health, and general welfare of the public. 16 AmJur 2d Constitutional Law, §264, p. 518. Justice Holmes states that in a general way, the police power extends to all the great public needs and may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. *Day-Brite Lighting, Inc. v. Missouri,*



342 U.S. 421, 92 L.Ed. 469, 72 S.Ct. 405, reh. den. 343 U.S. 921, 96 L.Ed. 1334, 72 S.Ct. 674.

In the case of *City of Eastlake v. Forest City Enterprise, Inc.,* US 49 L.Ed. 2d 132, 96 S.Ct. 2358, 178, this court upheld a city charter provision requiring land use changes to be proved by 55% of the voters, thereby reversing the Ohio Supreme Court which had held that the lack of standards to guide the decision of the voters was an arbitrary and capricious use of police power. This court took the view that a referendum is not a delegation of power since all powers arise from the people who can delegate it to the representative instrumentalities which they create. This court distinguished *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926) which had allowed a property owner to challenge a zoning restriction which was "clearly arbitrary and unreasonable", and on the further basis that *Eastlake* represented a referendum action of the community at large while *Euclid* represented a delegation to a narrow segment of the community. It should be noted that appellant in this case attacks the statute which was passed by the legislature of the State of North Dakota where the power to enact has not been delegated to a narrow segment of the community as in the *Euclid* case.

In the case of *Bridgeport Hydraulic Company v. Council of Water, etc.,* F. Supp. 942 (1977), a three-Judge District Court in Connecticut upheld a statute imposing a moratorium on the sale of water company lands as a permissible exercise of police power and not an arbitrary interference with private rights. This court in *Williamson v. Lee Optical,* 348 U.S. 483 held that it is enough to sustain the statute that there is an evil at hand for correction and that it might be thought that

the particular legislative measure was a rational way to correct it. Certainly the legislative intent of the North Dakota legislature as previously referred to in this brief, suggests a rational attempt at accomplishing a public need or interest. In *North Dakota Pharmacy Board v. Snyder's Stores,* 414 U.S. 156, 38 L.Ed. 2d 379, 94 S.Ct. 407 (1973), this court or certiorari, reversed the North Dakota Supreme Court and remanded for further proceedings thereby upholding a statutory stock ownership requirement by a registered pharmacist before a permit is issued to a corporation for operation of a pharmacy in the State of North Dakota. In so doing, the court overruled its holding in *Liggett Co. v. Baldridge,* 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57. This court had announced in *Daniel v. Family Security Life Insurance Company,* 336 U.S. 220, 93 L.Ed. 632, 69 S.Ct. 550, 10 ALR 2d 945, "A pronounced shift of emphasis since the *Liggett* case". In the *Snyder* case, supra, this court impliedly acknowledged the proper exercise of police powers for the protection of the public in upholding the stock ownership requirement provisions of the North Dakota act. In view of that line of cases, it would appear that the clearly proper exercise of the police powers of the State of North Dakota in adopting the Highway Beautification Act was based upon a demonstrated public need and interest as previously discussed, removing it from any consideration by this court as to its repugnancy to any federal statute or constitutional provision.

(d) *Appellant contends that there is a deprivation of due process by taking property without just compensation.* Admittedly, the courts have held that the form of regulation can be so onerous as to constitute a taking which constitutionally requires compensation as in the



case of *Goldblatt v. Hempstad,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962). It has also been generally held that a reasonable restriction on the use of property pursuant to a state's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all beneficial use of this property. *Modjeska Signs Studios, Inc. v. Berle,* 43 N.Y. 2d 468, 373 NE 2d 255 (C.A.N.Y. 1977), app. dismissed 439 U.S. (October 2, 1978); *Suffolk Outdoor Advertising Company v. Hulse,* 43 N.Y. 2d 483, 402 N.Y.S. 2d 368, 373 NE 2d 263 (1977), app. dismissed; 439 U.S. (October 2, 1978). The question is whether the North Dakota Act is reasonably related to a proper purpose under the state's police power. The appellant has contended that the North Dakota legislature acted unreasonably, arbitrarily and without proper purpose. Appellant contends that the Act was passed in North Dakota only to comply with the federal law and thereby discounts the language contained in the preamble to the Act and in the declaration of policy, heretofore set forth in this brief. The North Dakota court concluded that the purposes set forth in the Act were within the proper scope of the police power of the state, and cited as authority for that conclusion the case of *Markham,* supra; *Inhabitants, Town of Boosebay v. National Advertising Company,* 347 At. 2d 419 (1975); *Cromwell v. Ferrier,* 19 N.Y. 2d 263, 225 N.E.2d 749 (1967).

The Act does compensate for removal of lawfully erected signs which due to the enactment of the statute become nonconforming. The court found that the Act

became effective January 1, 1968 and cited the case decided by the Court of Appeals of Louisiana, State, *Department of Highways v. Lamar Advertising Company of Louisiana, Inc.*, 304 S. 2d 779 (1974). Therefore, all signs erected or substantially expanded after January 1, 1968, were deemed illegal and subject to removal without compensation. The North Dakota Court also concluded that the Act did not deprive the appellant of all or substantially all of the beneficial use of its property. In so doing, the court recognized that there are substantial numbers of locations for maintenance of outdoor advertising signs available to the appellant for relocation of signs in conforming areas. Secondly, the law allows signs that were erected before or after the effective date of the Act in conforming areas to remain undisturbed. Most of those sign structures display changeable copy which allows for considerable latitude by an outdoor advertiser in continuing his business and providing advertising services to his customers. This regulation may incur some costs to the sign owner for relocation of sign structures now located in non-conforming areas, but the relocation of sign structures is an on-going project in keeping with the development of the State Highway system. This court has held that the mere fact that the regulation deprives the property owner of the most profitable use of this property is not necessarily enough to establish the owner's right to compensation. *United States v. Central Eureka Mining Company*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed. 2d 1228 (1958). This form of regulation is not so onerous as to constitute a taking which constitutionally requires compensation as suggested by this court in *Goldblatt*, supra, since only sign structures erected after the effective date of the Act are



subject to removal without compensation. In the meantime, those structures have generated revenue for the sign owner and are available for relocation to conforming areas along the State Highway system.

(e) *Appellees contend that waiver and estoppel prevents appellant from attacking the constitutionality of the Act.* The North Dakota legislature passed the Act in 1967 designating January 1, 1968 as the effective date. The Commissioner adopted a permit program pursuant to the Act and appellant obtained permits and erected signs pursuant to the permit program after the effective date of the Act and through the period of time that the litigation occurred. The constitutionality of the Act was first attacked several years after its effective date and only at the time when its enforcement was applied to signs erected or substantially expanded by the appellant after the effective date of the Act.

The authorities have generally held that constitutional provisions can be waived by individuals. 16 AmJur 2d Constitutional Law, §131-136 provides a reliable discussion of the legal authorities supporting this principle. Section 131 thereof provides as follows:

> "With certain exceptions an individual may waive constitutional provisions intended for his benefit, especially where no question of public policy or public morals is involved. Such waiver may be in writing or by conduct amounting to an estoppel; it must be voluntary. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.
>
> "It seems that constitutional provisions intended to protect property may in all instances be waived. Even some of the constitutional rights intended to

> secure personal liberty are subjects of waiver. Indeed, it has been said that the doctrine of waiver is applicable to all rights or privileges to which a person is legally entitled by constitutional guaranty, provided that such rights and privileges rest in the individual and are intended for his sole benefit.
>
> "It has been broadly stated that in civil actions, privileges which rise to the dignity of constitutional or statutory rights may be waived."

In Section 133 thereof is found the well recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is thought to be accomplished is per se illegal. The example cited is the estoppel which results where rights are secured on conditions preventing the questioning of a law. That authority cites this court's decision in *International & G.N.R. Co. v. Anderson County,* 246 U.S. 424, 62 L.Ed. 807, 38 S.Ct. 370. Section 135 thereof refers to the rule that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens, and cites this court's decision in *United Fuel Gas Co. v. Kentucky R. Com.,* 278 U.S. 300, 73 L.Ed. 390, 49 S.Ct. 150, and a long line of decisions from this court and other courts. The right to raise a constitutional question may also be waived by failing to take an appeal promptly, as established by this court's decision in *Andrews v. Swartz,* 156 U.S. 272, 39 L.Ed. 422, 15 S.Ct. 389. In this case, the appellant continued to maintain and erect outdoor advertising signs pursuant to the procedures set up under the act and acquired additional signs from



other advertising companies who terminated or diminished their activities under the provisions of the Act. The appellant should not be allowed to now attack the constitutionality of the Act which has provided to him the benefits of continuing his business under the permit program for over ten years, and deriving therefrom the revenue generated by the existing signs.

## CONCLUSION

The decision of the North Dakota Supreme Court does not present a substantial federal question for this court to review and the appeal should be dismissed or affirmed by this Court.

Respectfully submitted,

/s/ Albert A. Wolf
Albert A. Wolf
Special Assistant Attorney General
for the State of North Dakota
220 North Fourth Street
P.O. Box 773
Bismarck, North Dakota 58501
*Attorney for Appellees/Respondents*

As counsel for the North Dakota Highway Corridor Board, I hereby adopt the Brief of Walter R. Hjelle, as submitted by Albert A. Wolf, Special Assistant Attorney General for the State of North Dakota.

/s/ Max D. Rosenberg
Max D. Rosenberg
Special Assistant Attorney General
for the State of North Dakota for
North Dakota Highway Corridor
Board
P.O. Box 1398
Bismarck, North Dakota 58501